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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 168

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

VINCENT CONTE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

C. William Kraft, Jr.,
William R. Toal,
R. Paul Lessy,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF IN RE COMMONWEALTH OF PENNSYLVANIA (PLAINTIFF-APPELLEE) VS. VINCENT CONTE (DEFENDANT-APPELLANT) FILED AS OF NO. 231, OCTOBER TERM, 1943, IN THE SUPERIOR COURT OF PENNSYLVANIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania by C. William Kraft, Jr., District Attorney of the County of Delaware, Commonwealth of Pennsylvania, William R. Toal, First Assistant District Attorney of the said County of Delaware, and R. Paul Lessy, Assistant District Attorney of the said County of Delaware, respectfully prays Your Honorable Court to issue a Writ of Certiorari to the

Superior Court of Pennsylvania to review its judgment in the case of Commonwealth of Pennsylvania, Plaintiff-Appellee, vs. Vincent Conte, Defendant-Appellee—Cause No. 231, October Term, 1943, by which it reversed a judgment of the Court of Quarter Sessions of the Peace in and for the County of Delaware, from which reversal the Supreme Court of Pennsylvania did refuse a petition for the allowance of an appeal.

Judgments and Decrees Below.

1. January 11, 1943. Conviction before Davis W. Morris, Justice of the Peace of Delaware County, sentencing the Defendant, Vincent Conte, to pay a fine of Two Dollars ($2.00) and costs of prosecution (R. 4, 5).

2. From the aforesaid conviction an appeal was taken to the Court of Quarter Sessions of the Peace in and for the County of Delaware, which Court did, on August 18, 1943, enter the following judgment (R. 109, 110):

> (a) Defendant's (Vincent Conte) appeal from a summary conviction for violating the Pennsylvania School Code be and is hereby dismissed and the judgment of sentence of the Justice of the Peace be and is hereby affirmed;
>
> (b) Defendant (Vincent Conte) be and is hereby found guilty, after due hearing in Court, of the charge preferred against him of violating the Pennsylvania School Code in the respect that he would not permit his minor children attending the public school in Upper Chichester Township, Delaware County, Pennsylvania, to salute the American Flag in accordance with the manner and form as provided by the said School Code;
>
> (c) The Defendant (Vincent Conte) be and is hereby sentenced therefore to pay a fine of Two dollars ($2.00) and in default of payment of the same to be incarcerated in the County Jail for a period of five (5) days;

(d) Defendant (Vincent Conte) to pay the costs of these proceedings.

3. On an appeal from the judgment of the Court of Quarter Sessions of the Peace in and for the County of Delaware, the Superior Court of Pennsylvania did on January 27, 1944, enter the following judgment:

"Judgment is reversed" (R. 152).

4. On a petition by the Commonwealth of Pennsylvania for an allowance of appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania, the Supreme Court of Pennsylvania did enter the following judgment:

"And Now, March 22, 1944, This Appeal Refused. Per Curiam" (R. 164).

Question Presented.

Does a public school regulation requiring pupils to salute the Flag violate the Constitution of the United States?

Sections of the Constitution and Statute Involved.

1. First Amendment to the Constitution of the United States.

2. Fourteenth Amendment to the Constitution of the United States.

3. School Code of Pennsylvania, as amended, being the Act of July 1, 1937, P. L. 2560, Section 11 (24 P. S. Section 1430) which provides as follows:

"Every parent, guardian or person in parental relation in this Commonwealth, having control or charge of any child or children of compulsory school age, who shall fail to comply with the provisions of this Act regarding compulsory attendance, shall be guilty of a

misdemeanor and on conviction thereof before any * * * Justice of the Peace, shall be sentenced to pay a fine, for the benefit of the School District in which such offending person resides, not exceeding Two dollars ($2.00) for the first offense * * * together with costs, and in default of the payment of such fine and costs by the persons so offending, shall be sentenced to the county jail for a period not exceeding five (5) days * * *'' (R. 13).

4. Resolution of the School District of Upper Chichester dated April 7, 1942, as follows:

> "A motion by Mr. McGinnes, seconded by Mr. Christie, that we uphold our usual custom of Morning Exercises, Reading of the Bible, Pledge and Salute to the Flag, was carried, on personal vote, Mrs. Bennett No, Mr. Beauchamp Aye, Mr. McGinnes Aye, Mr. Dutton Aye, Mr. Christie Aye and Mr. Feist Aye'' (R. 9, 10).

Statement.

Defendant was convicted and sentenced by a Justice of the Peace in summary proceedings for a violation of the compulsory attendance provisions of the School Code of Pennsylvania, being Section 1423 of the Act of May 18, 1911 P. L. 309, as amended by Section 11 of the Act of July 1, 1937 P. L. 2560 (24 P. S. Section 1430) (R. 4, 5). From the sentence imposed, an appeal was allowed to the Court of Quarter Sessions of Delaware County (R. 11). After hearing, the Defendant was found guilty and sentenced by the said Court of Quarter Sessions (R. 109, 110).

The facts are that Vincent Conte is a member of the group known as Jehovah's Witnesses (R. 71). He is the father of two minor children, (R. 70) who were pupils in the Upper Chichester School District in the County of Delaware, Pennsylvania (R. 26, 36). His children refused to comply with the Resolution of the Board of School Direc-

tors which required all pupils to salute the American Flag at the Morning Exercises (R. 27, 37). The basis for the children's refusal to join in the Flag ceremony was an alleged religious belief entertained by the parent, who instructed his children not to salute the Flag because it was idolatrous and incompatible with the interpretation of the Bible (R. 66). Following the children's refusal to salute the Flag they were sent home each day by the school authorities (R. 30, 38). The father thereupon was charged with violating the School Code relative to compulsory attendance (R. 2).

Rulings of the Court Below.

The Superior Court of Pennsylvania in reversing the judgment of conviction of the Lower Court held that although the Commonwealth of Pennsylvania had urged that Court "to give the United States Supreme Court an opportunity to reinstate its long established rule which required all in attendance at public schools to salute the National flag where the flag salute was part of the school ceremony", nonetheless it was bound by the case of *West Virginia State Board of Education et al* v. *Barnett et al*, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1171, 1180, and said (R. 151),

> "Therefore, regardless of any personal views we may entertain concerning the reasonableness or unreasonableness of appellant's position, we shall adhere to the last ruling of the United States Supreme Court."

Reasons for Granting the Petition.

1. This case involves the application of a constitutional principle and not an interpretation of the Constitution to extract the principle itself, so that Your Honorable Court may, within its discretion, re-examine the bases of prior decisions on the question involved when convinced of former error. (*Smith* v. *Allwright*, 64 S. Ct. 756, 765.)

2. Conscientious scruples have not, in the course of the long struggle of religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. (*Minersville School District* v. *Gobitis,* 310 U. S. 586.)

3. The conviction of Conte did not violate any right under the Constitution of the United States nor under the Constitution of Pennsylvania. (*Minersville School District* v. *Gobitis,* 310 U. S. 586; *Commonwealth of Pennsylvania* v. *Herr,* 229 Pa. 132.)

4. Saluting the National Flag does not violate the written law of Almighty God as contained in the Bible, and refusal so to do is not founded upon a religious belief.

5. Saluting the National Flag merely means civil fidelity and obedience which the individual owes to the Government under which he lives, in return for the civil protection he receives, it does not pretend to invade the realm of religious fidelity or obedience.

6. The wisdom of training children in patriotic impulses is not for the independent judgment of the Courts and even if the Courts were convinced of the folly of such a measure, such belief would not be any proof of its unconstitutionality.

For these reasons it is respectfully submitted that this Petition should be granted.

C. William Kraft, Jr.,
District Attorney.
William R. Toal,
First Assistant District Attorney.
R. Paul Lessy,
Assistant District Attorney.

COMMONWEALTH OF PENNSYLVANIA,
County of Delaware, ss.:

C. WILLIAM KRAFT, JR., being duly affirmed according to law, deposes and says that he is District Attorney of the County of Delaware and Commonwealth of Pennsylvania; that by virtue of his office as District Attorney he is authorized to file this affidavit for and on behalf of the Commonwealth of Pennsylvania; that the facts contained in the foregoing Petition are true; and that the said Petition is not filed for the purpose of delay, but because the Petitioner verily believes injustice has been done.

C. WILLIAM KRAFT, JR.

Affirmed and subscribed before me this 23rd day of May, A. D. 1944.

MARGARET M. HALEY,
Notary Public.

[Seal]

My Commission Expires: January 18, 1947.

BRIEF IN SUPPORT OF PETITION.

Opinions of Subordinate Court.

The first opinion of any Court of Record was delivered by The Court of Quarter Sessions of the Peace of Delaware County, Pennsylvania. It was written by President Judge A. D. MacDade and was filed on August 18, 1943. It appears on pages 85-110 of the Record and is not reported.

The Opinion of the Superior Court of Pennsylvania (Keller, P. J., Baldrige, Stadtfeld, Rhodes, Hirt and Kenworthey, J. J.—Rhodes, J., writing) was filed on January 27, 1944, and appears at pages 156, 158 of the Record. It is reported in 154 Pa. Super. Ct. 112, and in 35 Atlantic Reporter 2nd Series 742.

The Opinion of the Supreme Court of Pennsylvania was filed on March 22, 1944, and appears at page 164 of the Record. At the time of the preparation of this Brief it has not been reported.

Jurisdiction.

The Supreme Court of the United States has jurisdiction by virtue of the provisions of *Revised Statutes Section 690, 709*, as last amended by the *Act of February 13, 1925, C. 229, Section 1, 43 Statute 937* (28 U. S. C. A. Section 344), which provides:

> "* * * It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution * * * of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *

> of * * * the United States; and the Power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *."

The Facts.

A concise statement of the facts in this case has hereinbefore been set forth in the Petition for Certiorari to which incorporation by reference is hereby made, and will not, therefore, be repeated here.

ARGUMENT.

I. Power to Re-Examine Recent Decision.

It was recently said in the case of *Smith* v. *Allwright*, 64 Supreme Court 757:

> "* * * We are not unmindful of the desirability of continuity of decisions in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon an amendment and upon legislative action, this Court, throughout its history, has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been the accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself."

It is, therefore, respectfully submitted that although Your Honorable Court has recently decided this self-same question in the case of *West Virginia State Board of Education, et al.* v. *Barnett, et al.*, 319 U. S. 624, 63 S. Ct. 1178, there is in that case such error that the principles of law

there announced ought to be re-examined so that the prior contrary decisions be again made the law of the land.

II. Contrary Decisions.

(a) Decisions holding the Constitutional claim to be unmeritorious:

Leoles v. *Landers*, 302 U. S. 656;
Hering v. *State Board of Education*, 303 U. S. 624;
Gabirelli v. *Nickerbocker*, 306 U. S. 621;
Johnson v. *Deerfield*, 306 U. S. 621;
Minersville School District v. *Gobitis*, 310 U. S. 586.

(b) Decision sustaining the Constitutional Claim:
West Virginia State Board of Education v. *Walter Barnett*, 63 Supreme Court 1178.

III. Conclusion.

No more forceful arguments could be used by the Commonwealth of Pennsylvania than those which were set forth in the majority opinion of *Minersville School District* v. *Gobitis*, 310 U. S. 586, and in the dissenting opinion of *West Virginia State Board of Education* v. *Barnett*, 319 U. S. 624.

To attempt to change the forceful language in those opinions or to attempt to amplify the reasons therein set forth would be to assume knowledge that has already been exhaustively announced and discussed.

This case is of such moment that the sovereign State of Pennsylvania has seen fit to apply to Your Honorable Court to reinstate its long established rule which required all in attendance at public schools to salute the National Flag where the Flag salute was part of the school ceremony.

The questions which this application suggests should be definitely settled by this Court. They involve the rights,

duties and obligations of all of the school children in this Country.

All of which is respectfully submitted.

WILLIAM KRAFT, JR.,
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District Attorney,
WILLIAM R. TOAL,
First Assistant District Attorney,
R. PAUL LESSY,
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